

3/3/2017 3:40:35 PM  
16CV38474

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

PROVIDENCE HEALTH & SERVICES- OREGON, an Oregon nonprofit corporation, dba Providence Portland Medical Center	)	<b>Case No. 16CV38474</b>
	)	
Plaintiff,	)	<b>DEFENDANT MANCUSO'S</b>
	)	<b>MOTION TO DISMISS FIRST</b>
	)	<b>AMENDED COMPLAINT</b>
v.	)	
	)	<b>Assigned Motions Judge Eric J. Block</b>
SANJANA PAHALAD MANCUSO, personal representative of the Estate of Rattan Kumar Pahalad, in her official and personal capacities, and ELAP SERVICES, LLC, a Delaware limited liability company,	)	<b>Oral Argument Requested</b>
	)	
Defendants.	)	

**UTCR 5.050 CERTIFICATION**

Defendants estimate that 60 minutes for the hearing will be required. Official court reporting services are not requested.

**UTCR 5.010 CERTIFICATION**

Counsel for Defendants Sanjana Pahalad Mancuso spoke with plaintiff's counsel by telephone and made a good faith effort to confer about the substance of this motion, but the parties could not reach agreement.

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT - 1**

**GORDON & POLSCER, L.L.C.**  
9755 S.W. Barnes Road, Suite 650  
Portland, OR 97225  
Telephone: (503) 242-2922

1 **MOTION**

2 Pursuant to ORCP 21(a)(8), Defendant Sanjana Pahalad Mancuso, personal  
 3 representative of the Estate of Rattan Kumar Pahalad (the Estate), in her official and personal  
 4 capacities, moves to dismiss the second claim for relief, *i.e.*, breach of fiduciary duty, asserted by  
 5 Plaintiff, Providence Health & Services-Oregon (PH&S-O), in its First Amended Complaint.  
 6 Mancuso filed a similar motion to dismiss PH&S-O's Complaint. During the February 8, 2017  
 7 hearing before the Honorable Eric J. Bloch, the Court required PH&S-O to amend the Complaint  
 8 to make the Complaint more definite and certain. Although PH&S-O filed the First Amended  
 9 Complaint, it has still failed to state claim for breach of fiduciary duty against Mancuso;  
 10 therefore, the Court should grant Mancuso's motion to dismiss.

11 **INTRODUCTION**

12 This case arises out of a dispute over the appropriate reimbursement to PH&S-O for  
 13 hospital goods and services it allegedly provided to Rattan Kumar Pahalad before his death at the  
 14 hospital. Despite being paid for those goods and services by Pahalad's group health plan, PH&S-  
 15 O sought additional payment by filing a claim against the Estate. Based on the prior payment and  
 16 the failure of PH&S-O to establish the amount it sought to collect was reasonable, Mancuso, as  
 17 personal representative of the Estate, disallowed PH&S-O's claim. PH&S-O then filed this  
 18 action, but in addition to seeking to prove the validity of its claim against the Estate, PH&S-O  
 19 also seeks to impose personal liability against Mancuso merely for disallowing the claim in the  
 20 probate proceeding. The only damages it asserts are the burdens of having to prove the validity  
 21 of the claim against the Estate, *i.e.*, attorney's fees and "the time value of the claim against the  
 22 Estate lost due to the delay in allowing such claim." Importantly, PH&S-O does not allege  
 23 Mancuso violated any court order, acted inconsistently with the terms of the will, or improperly  
 24 caused the dissipation of any assets of the Estate; nor does PH&S-O allege any damages other  
 25 than attorney's fees and delay associated with having to prove the validity of the claim against  
 26 the estate.

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
 FIRST AMENDED COMPLAINT - 2**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

1 The Court should dismiss the breach of fiduciary duty claims for three separate reasons—  
 2 each of which is alone sufficient to warrant dismissal. First, the actions complained of by PH&S-  
 3 O are protected by the absolute litigation privilege since Mancuso took such actions in  
 4 connection with ongoing litigation. Second, Mancuso’s alleged conduct does not rise to the level  
 5 of a breach of fiduciary duty. Third, PH&S-O has not alleged any recoverable damages suffered  
 6 as a result of Mancuso’s alleged actions.

7 PH&S-O’s breach of fiduciary duty claim against Mancuso is novel and unprecedented.  
 8 No Oregon court has ever imposed personal liability on a personal representative for disallowing  
 9 a claim. Such liability is inconsistent with the probate code and the case law developed under the  
 10 code. Recognizing this cause of action would have a chilling effect on Oregonians’ willingness  
 11 to act as personal representatives by putting them in an irreconcilable conflict between claimants  
 12 and heirs of estates, threatening personal liability in virtually every instance. This Court should  
 13 decline PH&S-O’s invitation to make probate proceedings a minefield for personal  
 14 representatives by extending the breach of fiduciary cause of action far beyond its well-defined  
 15 limits.

### 16 **FACTUAL ALLEGATIONS**

17 PH&S-O alleges it is a nonprofit corporation providing health services to patients. (First  
 18 Amended Complaint (FAC), at ¶ 1.) PH&S-O allegedly provided treatment to Pahalad on March  
 19 23, 2016. (FAC, at ¶ 4.) Pahalad died on April 4, 2016. (FAC, at ¶ 4.) Pahalad allegedly signed a  
 20 Conditions of Admission form, which did not contain an agreed upon price but did indicate PH&S-  
 21 O would bill “Charge Master rates in effect when services are provided.” (FAC, at ¶ 5.) PH&S-O  
 22 asserts Pahalad owed \$740,263 for the goods and services provided to him before he died. (FAC, at  
 23 ¶ 6.) PH&S-O has already been paid \$304,761.29 for the goods and services it provided to  
 24 Pahalad. (FAC, at ¶ 6.) PH&S-O does not allege the amount it billed is reasonable; however, it  
 25 seeks to collect an additional \$435,520.17. (FAC, at ¶ 10.)

26 Mancuso is the daughter of Pahalad and the personal representative of the Estate. (FAC, at

**DEFENDANT MANCUSO’S MOTION TO DISMISS  
 FIRST AMENDED COMPLAINT - 3**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

1 ¶ 2.) PH&S-O alleges it timely submitted a claim for payment to the Estate on August 25, 2016.  
 2 (FAC, at ¶ 12.) Acting as personal representative of the Estate, Mancuso timely and properly  
 3 requested documentation supporting the claim asserted by PH&S-O. (FAC, at ¶ 12.) PH&S-O  
 4 alleges it provided the requested documentation on October 12, 2016. (FAC, at ¶ 12.) On October  
 5 24, 2016, Mancuso, acting as the personal representative of the estate, disallowed PH&S-O's claim  
 6 on the basis that PH&S-O has already been paid properly and PH&S-O's charges are grossly  
 7 excessive in comparison to the amounts typically paid and costs incurred to provide the goods and  
 8 services at issue. (FAC, at ¶ 17 and Exhibit 2.)

9 PH&S-O alleges Mancuso made several false statements in the Notice of Disallowance of  
 10 Claim filed in the probate proceeding and attached to the First Amended Complaint as Exhibit 2.  
 11 Ironically, while alleging Mancuso made a false statement, PH&S-O's clearly makes false  
 12 statements in its First Amended Complaint. For example, in paragraph 17, PH&S-O alleges, "In  
 13 her denial, Mancuso contended that 'neither the decedent nor the estate ever agreed to pay' PH&S-  
 14 O's Chargemaster rates . . . ." However, the Notice of Disallowance of Claim clearly states only  
 15 that, "Through [PH&S-O's] claim, [PH&S-O] seek[s] to collect excessive, unreasonable charges  
 16 that neither the decedent nor the estate ever agreed to pay." Mancuso simply did not make the  
 17 statement attributed to her by PH&S-O, and that is conclusively established by the exhibit to the  
 18 First Amended Complaint. PH&S-O alleges other statements in the Notice of Disallowance of  
 19 Claim are also false, including statements such as Mancuso's contention that the Estate is not liable  
 20 to pay the charges at issue and that PH&S-O has already been paid properly for the goods and  
 21 services. PH&S-O does not allege Mancuso made any false statement outside of the Notice of  
 22 Disallowance of Claim.

23 PH&S-O alleges it has been damaged by Mancuso's actions because it was forced to file  
 24 this action and incur costs, expenses, and attorney's fees to prove the validity of its claim against  
 25 the Estate and it "lost the time value of the Claim occasioned by the delay caused by the denial..."  
 26 Thus, the only damages PH&S-O alleges are attorney's fees incurred establishing the validity of its

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
 FIRST AMENDED COMPLAINT - 4**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

1 claim and interest. PH&S-O does not allege Mancuso acted in violation of a court order, contrary  
2 to the terms of the will, or in a manner that improperly dissipated assets of the Estate.

### 3 **ARGUMENT**

4 The Court should dismiss PH&S-O's cause of action for breach of fiduciary duty. All of  
5 the alleged misconduct constitutes actions or statements made in connection with or incident to a  
6 judicial proceeding, making all such alleged misconduct protected by the absolute litigation  
7 privilege. Separately, none of the alleged statements or conduct constitutes a breach of fiduciary  
8 duty within the meaning of the probate code, nor are the allegations sufficient to impose personal  
9 liability against Mancuso. Finally, PH&S-O has neither alleged nor suffered any damages as a  
10 resulted of alleged breach of fiduciary duty. Accordingly, PH&S-O fails to state a claim for  
11 which relief may be granted.

#### 12 **I. PH&S-O's Cause of Action Is Barred by the Absolute Privilege Because All of** 13 **Mancuso's Allegedly Improper Conduct Occurred in the Context of a Pleading** 14 **Filed in the Probate Proceeding**

15 "Oregon courts have long recognized, and enforced, an absolute privilege for statements  
16 in the course of or incident to judicial and quasi-judicial proceedings. That privilege applies  
17 equally to parties to such proceedings and to their attorneys." *Mantia v. Hanson*, 190 Or App  
18 412, 417 (2003). The absolute privilege applies to "actions taken and statements made in  
19 connection with a judicial proceeding." *Franson v. Radich*, 84 Or App 715, 719 (1987). The  
20 absolute privilege cannot be used as a bar when the actor's conduct is so egregious that (1) the  
21 actor lacked probable cause for the actions or statements, (2) the primary purpose of the  
22 statements was something other than adjudicating the claims asserted, and (3) the prior  
23 proceedings were terminated in favor of the party now bringing the claim. *Mantia*, 190 Or App at  
24 429.

25 The absolute privilege protects Mancuso's statements in the Notice of Disallowance of  
26 Claim filed in the probate proceeding. Statements made in a pleading filed in a probate

**DEFENDANT MANCUSO'S MOTION TO DISMISS**  
**FIRST AMENDED COMPLAINT - 5**

**GORDON & POLSCER, L.L.C.**  
9755 S.W. Barnes Road, Suite 650  
Portland, OR 97225  
Telephone: (503) 242-2922

1 proceeding are clearly made in the course of a judicial proceeding. *See Mantia*, 190 Or App at  
 2 417. The absolute privilege extends to parties and their attorney's in such proceedings. *Id.*  
 3 Because the absolute privilege also applies to actions taken in connection with a judicial  
 4 proceeding, the act of disallowing PH&S-O's claim in the probate proceeding is also subject to  
 5 the absolute privilege. *See Franson*, 84 Or App at 719. Because Mancuso's only allegedly  
 6 improper conduct occurred in connection with the probate proceeding, the absolute privilege bars  
 7 PH&S-O's breach of fiduciary duty claim against her unless PH&S-O can avail itself of the  
 8 exception to the absolute privilege delineated in *Mantia*.

9 The allegations in the First Amended Complaint foreclose PH&S-O from availing itself  
 10 of the *Mantia*'s exception to the absolute privilege. The *Mantia* exception requires three  
 11 showings: (1) the actor lacked probable cause, (2) the actor's primary purpose was something  
 12 other than adjudication of the claims in the prior proceeding, and (3) the prior proceeding was  
 13 terminated in favor of the party bringing the new claim.

14 First, Mancuso did not lack probable cause. PH&S-O's allegations make this clear  
 15 because it alleges ELAP provided all of the allegedly false information to Mancuso. (FAC, at  
 16 ¶¶ 17, 30.) Since ELAP allegedly communicated all of this information to Mancuso, she  
 17 possessed probable cause for her statements and disallowance of the claim. PH&S-O's own  
 18 allegations make it clear that it cannot satisfy the first prong of the *Mantia* exception.

19 Second, PH&S-O fails to allege Mancuso acted for any purpose other than the  
 20 adjudication of the claims at issue in the probate proceeding—nor could it allege otherwise.  
 21 Mancuso merely decided whether to allow or disallow the claim filed by PH&S-O in the probate  
 22 proceeding. She could not have been acting for any other or improper purpose. While PH&S-O  
 23 does allege ELAP acted for improper purposes (FAC, at ¶ 11), it does not and cannot allege  
 24 Mancuso did so. In fact, PH&S-O contends that Mancuso is a victim of ELAP. (FAC, at ¶ 11.)  
 25 Thus, PH&S-O cannot satisfy the second prong of the *Mantia* exception.

26 Third, PH&S-O cannot satisfy the third prong of the *Mantia* exception because the

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
 FIRST AMENDED COMPLAINT - 6**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

1 probate proceeding was not resolved in favor of PH&S-O. PH&S-O clearly has not alleged  
 2 otherwise and cannot do so as it has not established the claim against the Estate should have been  
 3 allowed. PH&S-O's breach of fiduciary duty claim in this action puts the cart before the horse.

4 Actions taken and statements made in connection with a judicial proceeding are afforded  
 5 an absolute privilege insulating litigants from liability. The absolute privilege bars PH&S-O's  
 6 claim against Mancuso for disallowing the claim against the Estate in the probate proceeding,  
 7 and PH&S-O's allegations foreclose it from establishing an exception to the absolute privilege.  
 8 Accordingly, the Court should grant Mancuso's motion to dismiss PH&S-O's claim for breach of  
 9 fiduciary duty.

## 10 **II. Mancuso's Alleged Actions Were Not Improper and Do Not Support Personal** 11 **Liability Against Mancuso**

12 No Oregon court has ever imposed personal liability on a personal representative or  
 13 found a breach of fiduciary duty for the mere disallowance of a probate claim. This Court should  
 14 not do so for the first time. Mancuso disallowed the probate claim in accordance with the probate  
 15 code's procedures. Mancuso's disallowance of PH&S-O's probate claim is not remotely similar  
 16 to the conduct courts have found constitutes a breach of fiduciary duty under ORS 114.395—the  
 17 code section under which PH&S-O contends its claim arises. The alleged conduct also does not  
 18 violate ORS 115.405, which governs the personal liability of personal representatives to third  
 19 parties. If the Court recognized this cause of action as a viable claim, it would have a chilling  
 20 effect on all Oregonians' willingness to serve as personal representatives, detrimentally  
 21 impacting the state's probate system.

### 22 **A. Mancuso Disallowed the Claim Properly under the Probate Code**

23 When a claimant, like PH&S-O submits a claim against an estate, the personal representative  
 24 must allow or disallow the claim in accordance with the statutory procedures. The probate code  
 25 governs the manner in which claims against the estate shall be presented to the personal  
 26 representative. ORS 115.005 and ORS 115.025. The code further provides the claimant must

**DEFENDANT MANCUSO'S MOTION TO DISMISS**  
**FIRST AMENDED COMPLAINT - 7**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

1 produce written evidence of the claim when demanded by the personal representative. ORS  
 2 115.045. The personal representative then either allows or disallows the claim. ORS 115.135(1). If  
 3 the claim is disallowed, the personal representative must file a notice of disallowance pursuant to  
 4 the statute's requirements. ORS 115.135(2). If the claim is disallowed, the claimant may pursue the  
 5 claim by requesting a summary determination or filing a separate action. ORS 115.145(1). The  
 6 court considering the claim will then enter judgment in the amount of liability, if any, and the claim  
 7 will be allowed in such amount. ORS 115.145(3).

8 This is precisely the procedure Mancuso followed upon receipt of the claim, and PH&S-O  
 9 does not allege otherwise. In fact, PH&S-O's own allegations demonstrate Mancuso followed the  
 10 statutorily required procedures. PH&S-O alleges (1) it timely submitted a claim for payment to the  
 11 estate on August 25, 2016 (FAC, at ¶ 12); (2) Mancuso requested written documentation  
 12 supporting the claim (FAC, at ¶ 12); (3) PH&S-O provided the requested documentation (FAC, at  
 13 ¶ 12); and (4) Mancuso, acting as the personal representative of the estate, disallowed PH&S-O's  
 14 claim (FAC, at ¶ 17 and Exhibit 2). None of these allegations support any wrongdoing on the part  
 15 of Mancuso or the Estate. Of course, PH&S-O contends the claim should have been allowed rather  
 16 than disallowed; however, the remedy for a disallowed claim is not personal liability of the  
 17 personal representative, but rather the ability to request summary determination or file a separate  
 18 action. *See* ORS 115.145(1).

19 ORS 115.145 provides the remedy available to a claimant whose claim is incorrectly  
 20 disallowed:

21 In a proceeding for summary determination of a claim or in a separate action on a claim,  
 22 the claim shall be allowed or judgment entered on the claim in the full amount of the  
 23 liability, if any, of the decedent to the claimant. However, **the claim shall be paid only to  
 the extent of the assets of the estate allocable to the payment of the claim pursuant to  
 ORS 115.115 and 115.125.**

24 ORS 115.145(3) (emphasis added). Through its breach of fiduciary duty claim, PH&S-O is seeking  
 25 to do exactly what the probate code prohibits: collect more than the amount of assets allocable to  
 26

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
 FIRST AMENDED COMPLAINT - 8**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922



1 the claim under the code. *See* FAC, at ¶ 27(b) (asserting “Mancuso is personally liable in the event  
2 that estate assets are insufficient to fully pay PH&S-O”). The breach of fiduciary cause of action is  
3 merely an attempt at an end run around the carefully crafted procedures of the probate code.

4 **B. Disallowance of a Probate Claim Is Not Improper Exercise of Power**

5 PH&S-O contends Mancuso owed it a fiduciary duty and she breached that fiduciary  
6 duty; however, PH&S-O has not alleged any facts sufficient to establish a breach of fiduciary  
7 duty claim. Instead, PH&S-O merely alleges Mancuso disallowed a claim she should have  
8 allowed. This is not a breach of fiduciary duty, as it merely requires PH&S-O to prove the  
9 validity of its claim. The probate code explains the kinds of actions that give rise to liability  
10 under O.R.S. 114.395:

11 If the exercise of power by a personal representative in the administration of an estate is  
12 improper, the personal representative is liable for breach of fiduciary duty to interested  
13 persons for resulting damage or loss to the same extent as a trustee of an express trust.  
14 **Exercise of power in violation of a court order is a breach of duty. Exercise of power  
contrary to the provisions of the will may be a breach of duty.**

15 O.R.S. 114.395. Acting in violation of a court order gives rise to liability for breach of fiduciary  
16 duty, and acting contrary to the terms of the will might give rise to such liability. *Id.*

17 Courts have also found liability under this code section when personal representatives  
18 have acted improperly to the detriment of the estate. For example, when a personal representative  
19 made statements as a “joke” that he had not accounted for all the assets and those statements had  
20 to be investigated at the expense of the estate, the personal representative breached his fiduciary  
21 duty. *Moser v. Van Winkle*, 103 Or App 398 (1990). When a personal representative paid  
22 himself out of estate assets without following proper procedures for obtaining authorization, he  
23 breached his fiduciary duties to the estate. *In re Coe*, 302 Or 553 (1987). Courts have  
24 contemplated liability for breach of fiduciary duty in situations in which a personal  
25 representative sells estate assets or compromises a wrongful death claim for insufficient value.  
26 *See In re Estate of White*, 289 Or 13 (1980); *Wittick v. Miles*, 274 Or 1 (1976); *In re Estate of*

**DEFENDANT MANCUSO’S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT - 9**

**GORDON & POLSCER, L.L.C.**  
9755 S.W. Barnes Road, Suite 650  
Portland, OR 97225  
Telephone: (503) 242-2922

1 *White*, 41 Or App 439 (1979). Courts have found or contemplated possible liability for breach of  
 2 fiduciary duty only when estate assets have been improperly depleted.

3 PH&S-O makes no allegation, nor can it, that Mancuso violated a court order, acted  
 4 contrary to the terms of the will, or caused an improper diminution in assets of the Estate.  
 5 Accordingly, there is no breach of fiduciary duty. The only allegation against Mancuso is that  
 6 she disallowed a claim that should have been allowed. Requiring a claimant to establish the  
 7 validity of its claim is not a breach of fiduciary duty. *See* ORS 115.145(3).

8 PH&S-O's attempt to color the disallowance as improper because it contains false  
 9 statements tests the boundaries of frivolous litigation. PH&S-O suggests that denying liability,  
 10 contending PH&S-O has already been properly paid, and taking the position that costs to provide  
 11 the goods and services are relevant to their reasonable value in the Notice of Disallowance were  
 12 false statements to the probate court. It is well settled that such contentions or expressions of  
 13 opinion are not actionable. *See, e.g., Horner v. Wagdy*, 173 Or 441, 455 (1944). The assertions  
 14 that Mancuso falsely stated neither the Estate nor Pahalad ever agreed to pay Charge Master  
 15 rates is even more problematic because Mancuso made no such statement. Mancuso merely  
 16 stated, "Through [PH&S-O's] claim, [PH&S-O] seek[s] to collect excessive, unreasonable charges  
 17 that neither the decedent nor the estate ever agreed to pay." (FAC, at Exhibit 2.) In turn, PH&S-O  
 18 alleges, "In her denial, Mancuso contended that 'neither the decedent nor the estate ever agreed to  
 19 pay' PH&S-O's Chagemaster rates . . . ." (FAC, at ¶ 17.) Thus, PH&S-O's contention—that  
 20 Mancuso denied the Estate or Pahalad agreed to pay PH&S-O's Charge Master rates—is itself  
 21 false.<sup>1</sup> Mancuso never made such a statement, as conclusively demonstrated by Exhibit 2 to the  
 22 First Amended Complaint. Regardless, PH&S-O has simply failed to identify any conduct on the  
 23

---

24  
 25 <sup>1</sup> PH&S-O's statement can only be true if it admits its Charge Master rates are excessive,  
 26 unreasonable charges.

1 part of Mancuso that is “improper” within the meaning of ORS 114.395. Accordingly, the Court  
 2 should dismiss the breach of fiduciary duty cause of action.

3 **C. Personal Representatives Are Not Personally Liable for Disallowing Probate**  
 4 **Claims**

5 PH&S-O also fails to plead facts sufficient to impose personal liability under ORS 114.405,  
 6 which is the statutory provision governing personal liability of personal representatives. Subsection  
 7 1, which governs personal liability to third parties, is the most relevant:

8 The personal liability of a personal representative to third parties, as distinguished from  
 9 fiduciary accountability to the estate, arising from the administration of the estate is that of  
 10 an agent for a disclosed principal.

11 ORS 114.405(1). Here, PH&S-O is a third party seeking to impose personal liability on Mancuso  
 12 for acts arising from her administration of the Estate, *i.e.*, disallowing the claim against the Estate.  
 13 Thus, ORS 114.405(1) governs Mancuso’s personal liability. In such a situation, ORS 114.405(1)  
 14 limits personal liability to that imposed on an agent acting for a disclosed principal. *Id.* The agent  
 15 of a disclosed party is not personally liable so long as the agent acts within the scope of her  
 16 authority, discloses her representative capacity, and acts in her representative capacity. *Wiggins v.*  
 17 *Barrett & Associates*, 295 Or 679, 698 (1983).

18 Mancuso is not personally liable to PH&S-O here because she was acting within the scope  
 19 of her authority, disclosed her representative capacity, and acted in that capacity. Deciding whether  
 20 to allow or disallow a claim against the estate is clearly within the scope of authority of a personal  
 21 representative. ORS 115.135 and ORS 115.145. Thus, when Mancuso disallowed the claim, she  
 22 was acting within the scope of her authority. Without a doubt, Mancuso both disclosed her  
 23 representative capacity and PH&S-O was aware of her representative capacity when she  
 24 disallowed the claim. (FAC, at Exhibit 2.) Finally, Mancuso’s disallowance of the claim was  
 25 undoubtedly in her representative capacity as personal representative of the estate. (FAC, at  
 26 Exhibit 2.) Accordingly, Mancuso cannot be held personally liable for disallowing the claim

**DEFENDANT MANCUSO’S MOTION TO DISMISS**  
**FIRST AMENDED COMPLAINT - 11**

**GORDON & POLSCER, L.L.C.**  
 9755 S.W. Barnes Road, Suite 650  
 Portland, OR 97225  
 Telephone: (503) 242-2922

submitted by PH&S-O.

**D. Recognizing PH&S-O's Cause of Action under these Circumstances Would Detrimentally Impact the Probate System**

If courts permitted causes of action for breach of fiduciary duty under these circumstances, the court system would be clogged with such claims. Recognizing this cause of action under these circumstances would mean that any claimant or heir to an estate can state a claim for breach of fiduciary duty against a personal representative any time a claim is allowed or disallowed merely by alleging the personal representative made the wrong decision. The probate code's procedures for handling disputed claims would be eviscerated and lawsuits would abound. Oregonians would be dis-incentivized from serving as personal representatives because they would be exposed to litigation and potential personal liability whenever they were required to allow or disallow a claim. The threat of widespread personal liability of personal representatives would have a detrimental effect on the entire probate system as no one would want to serve as a personal representative. No Court has ever held the disallowance of a probate claim constituted a breach of fiduciary duty, and this Court should not be the first.

**IV. PH&S-O Fails to Allege Any Recoverable Damages**

In order to state a claim for breach of fiduciary duty, the plaintiff must allege damages. *See* O.R.S. 114.395. PH&S-O did not allege any damages flowing from the alleged breach of fiduciary duty in the Complaint. Instead, PH&S-O stated it has been damaged by being "forced to file this lawsuit to collect the Claim against the estate and Mancuso," (FAC, at ¶ 27(a)), and losing "the time value of the Claim occasioned by the delay caused by the denial so it is entitled to interest," (FAC, at ¶ 27(b)). PH&S-O seeks to collect attorney's fees, costs, and interest as a result of these purported injuries, but PH&S-O does not allege any other damages. Attorney's fees, costs, and interest are not recoverable as damages.

**DEFENDANT MANCUSO'S MOTION TO DISMISS  
FIRST AMENDED COMPLAINT - 12**

**GORDON & POLSCER, L.L.C.**  
9755 S.W. Barnes Road, Suite 650  
Portland, OR 97225  
Telephone: (503) 242-2922

1           **A. Attorney's Fees**

2           Under the American Rule, a litigant generally cannot recover attorney's fees unless there is  
 3 a statutory or contractual right to recover such fees. *Peace River Seed Co-op, Ltd. v. Proseeds*  
 4 *Marketing, Inc.*, 355 Or 44, 65 (2014). Attorney's fees are generally not recoverable as  
 5 consequential damages. *Raymond v. Feldman*, 124 Or App 543, 548–49 (1993). *See also Strawn v.*  
 6 *Farmers Ins. Co.*, 353 Or 210, 227–228 (2013). Absent a contractual or statutory entitlement to  
 7 attorney's fees, they are recoverable as damages only when the defendant's conduct caused the  
 8 plaintiff to become engaged in litigation with a third party. *See Huffstutter v. Lind*, 250 Or 295, 301  
 9 (1968).

10           PH&S-O did not allege any facts that would entitle it to attorney's fees for Mancuso's  
 11 alleged breach of fiduciary duty. PH&S-O has not identified any contractual or statutory obligation  
 12 on the part of Mancuso to pay PH&S-O's attorney's fees.<sup>2</sup> PH&S-O also has not alleged  
 13 Mancuso's conduct caused it to become embroiled in litigation with any third party. Instead,  
 14 PH&S-O cites *Moser v. Van Winkle*, 103 Or App 398, 403 (1990), for the proposition that costs  
 15 and attorney's fees are recoverable as damages. But *Moser* does not support such a broad right to  
 16 recover attorney's fees and is easily distinguishable from the case at bar. In *Moser*, the court of  
 17 appeals affirmed a surcharge against Moser for false statements he made about missing assets that  
 18 caused respondents to investigate at the expense of the estate. *Id.* at 400, 403. The attorney's fees  
 19 awarded against Moser were the expenses of the estate because they were incurred to investigate  
 20 missing assets as a result of Moser's statements. *Id.* at n.3. The court of appeals found it significant  
 21 that Moser's false statements "resulted in an investigation that depleted estate assets . . ." *Id.* at

---

22  
 23           <sup>2</sup> PH&S-O correctly states there is a clause concerning attorney's fees in a document allegedly  
 24 signed by Pahalad (FAC, at ¶ 27(a)); however, if that contractual attorney's fee provision is valid, it is  
 25 only enforceable against the Estate, not against Pahalad. That PH&S-O seeks attorney's fees from  
 26 Mancuso when it contends it has a valid claim for attorney's fees against the Estate reveals PH&S-O's  
 motive in bringing this unprecedented breach of fiduciary duty claim.

1 402. *Moser* stands for the narrow proposition that a personal representative can be liable for the  
 2 costs of a breach of fiduciary duty when that breach depletes estate assets, which is entirely  
 3 consistent with the language in 114.395 requiring the breach results in “damage or loss.” *See* ORS  
 4 114.395.

5 Here, unlike in *Moser*, Mancuso has done nothing other than disallow PH&S-O’s claim as  
 6 provided in the statutes and her actions have not resulted in the depletion of any estate assets. The  
 7 key factor in *Moser*—depletion of estate assets—is completely lacking in this case. PH&S-O is not  
 8 seeking to recover attorney’s fees paid by the estate, it is merely seeking attorney’s fees it may  
 9 incur in seeking to prosecute this action to recover additional payments from the estate. Attorney’s  
 10 fees incurred to prosecute a claim are not recoverable unless there is some statutory or contractual  
 11 obligation. *See Peace River*, 355 Or at 65. PH&S-O is not entitled to recover attorney’s fees for  
 12 Mancuso’s alleged breach of fiduciary duty; thus, attorney’s fees cannot be the damages allegedly  
 13 suffered by PH&S-O.

#### 14 **B. Interest**

15 PH&S-O also contends its damages from the alleged breach of fiduciary duty include  
 16 interest on its probate claim. The right to interest on a probate claim does not arise until after a  
 17 claim becomes “due” under the probate code. *Thomas by & Through Peterson v. State (In re Estate*  
 18 *of Thomas)*, 319 Or 520, 528 (1994). Payment of a claim is not “due” until the time provided in  
 19 O.R.S. 115.115. In turn, 115.115 provides that claims against the estate become due only after they  
 20 have been allowed. O.R.S. 115.115. PH&S-O’s probate claim has not been allowed—it was  
 21 disallowed; thus, payment is not “due” and interest has not accrued. *See In re Estate of Thomas*,  
 22 319 Or at 528–29. Since PH&S-O is not entitled to interest, that cannot be the damage suffered by  
 23 PH&S-O. Accordingly, PH&S-O not only failed to plead any recoverable damages arising from  
 24 the alleged breach of fiduciary duty. Therefore, Court should grant Mancuso’s motion.  
 25  
 26

1 **CONCLUSION**

2 PH&S-O fails to state a claim for relief that can be granted with respect to its second cause  
3 of action. Therefore, the Court should grant Mancuso's Motion to Dismiss the Claim.

4  
5 DATED this 3rd day of March, 2017.

6 GORDON & POLSCER, L.L.C.

7  
8 By: /s/Mary-Anne S. Rayburn

9 Mary-Anne S. Rayburn, OSB No. 803680

10 [mrayburn@gordon-polsцер.com](mailto:mrayburn@gordon-polsцер.com)

11 Robert Spajic, OSB No. 961519

12 Phone No. (503) 242-2922

13 By: /s/Kristopher R. Alderman

14 Kristopher R. Alderman, *Pro Hac Vice*

15 FISHERBROYLES, LLP

16 945 East Paces Ferry Road, Suite 2000

17 Atlanta, Georgia 30326

18 Phone: 404-596-8887

19 kris.alderman@fisherbroyles.com

20  
21 Attorneys for Defendant Sanjana Pahalad  
22 Mancuso

**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated below, I served on the following attorney(s) the foregoing **DEFENDANT MANCUSO'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** in the manner described below:

Arden J. Olson  
Harrang Long Gasry Rudnick, P.C.  
360 East 10<sup>th</sup> Avenue  
Suite 300  
Eugene, OR 97401

☒ U.S. Mail  
☐ Hand Delivery  
☐ Telefax  
☐ UPS  
☒ E-mail

*Attorney for Plaintiff*

DATED this 3<sup>rd</sup> day of March, 2017.

By: /s/Mary-Anne S. Rayburn

Mary-Anne S. Rayburn, OSB No.  
mrayburn@gordon-polsker.com  
Phone No. (503) 242-2922

Attorneys for Defendant Sanjana Pahalad  
Mancuso

**CERTIFICATE OF SERVICE - 1**

**GORDON & POLSCER, L.L.C.**  
9755 S.W. Barnes Road, Suite 650  
Portland, OR 97225  
Telephone: (503) 242-2922